Omnix International Corporation, d/b/a Waterbed World *and* Union Independiente de Supermercados y Tiendas Por Departamentos. Cases 24–CA–5160 and 24–CA–6985

January 5, 1990

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On January 5, 1990, Administrative Law Judge Elbert D. Gadsden issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief;[1] the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order for the reasons set forth below.

On September 30, 1987, the Board issued a Decision, Order, and Certification of Representative[3] adopting in relevant part the judge's findings that the Respondent had violated Section 8(a)(3) and (1) by refusing to permit employee Marilu Marquez to rescind her resignation and by discharging employee Gloria Garcia and Section 8(a)(1) by threatening employee Raisa Musa Quinones with unspecified reprisals for union activities. The Board adopted the judge's credibility resolutions with regard to Musa's testimony.[4] On January 22, 1988, the Respondent filed a motion to reopen the record and attached a statement dated December 15, 1987, and purportedly executed by Musa asserting that her testimony was false. On July 13, 1988, the Board granted the motion and remanded the case for resolution of the credibility issues raised by the motion.[5] A hearing pursuant to the Board's Order was held on April 17, 1989.[6]

Musa did not appear at the reopened hearing. The Respondent asserts that Musa is a declarant unavailable as a witness under Rule 804 of the Federal Rules of Evidence and that the December 15, 1987[7] out-of-court declaration is admissible as an exception to the hearsay rule.[8] The Respondent argues further that the December 15 document, quoted in full by the judge, requires a finding that the Respondent did not violate the Act as found in the underlying proceeding.

Rico testified at the reopened hearing that he first read the Board's decision in November 1987, did not agree with Musa's testimony, and met with Musa, who told him that ''she wanted to clarify things that she had been forced to do and say against her will—against [Rico].'' They agreed to meet again. On December 15, the date set for the second meeting, Rico prepared a statement for Musa to sign. At a restaurant that evening, he and an attorney, Ortiz-Murias, met a woman and man who identified themselves as Musa and her husband. Rico showed the statement to the woman, who identified the statements as her own and stated that she could ''live with that.'' She signed the statement with Musa's name. Ortiz-Murias testified that he accompanied Rico to the December 15 meeting because Rico wanted a statement preserved under oath. Ortiz-Murias did not verify the woman's identity. She told him that she made the statements in the document of her own free will. After she had signed it, Ortiz-Murias informed her that he wished to notarize the document, took it from her, and typed a notarial declaration on it in his office after the meeting had ended.

At the reopened hearing, the Respondent sought the admission of Rico's testimony regarding the conversations with Musa and of the December 15 document. The General Counsel objected that the statements were inadmissible as hearsay. The General Counsel also conditionally introduced an affidavit allegedly signed by Musa and dated March 5 declaring, in pertinent part, that Musa ''never signed a sworn statement or any other type of document in which I have changed my testimony at the hearing.'' She acknowledged having met with Rico and an attorney, but in the showroom of one of the Respondent's stores. She stated that Rico asked her whether she had been threatened by Marquez and Garcia: ''I said yes, that on one occasion Marilu [Marquez] had made me a death threat, but that it . . . had nothing to do with the Union.'' With regard to the December 15 document, Musa stated, ''[t]his is the first time that I see that document. I have never seen a document equal to this one in Spanish ei-

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the judge's decision is the result of bias and prejudice. Some of the Respondent's assertions were found without merit in the underlying proceeding. With regard to the allegations pertaining to the instant phase of this proceeding, we have examined the record and find that the Respondent's allegations are without merit.

[3] 286 NLRB 425 (1987).

[4] Musa testified, inter alia, that Respondent's secretary-treasurer, Jaime Rico, told her that he knew that Marquez had brought the Union into the Company and that she should not get involved.

[5] 289 NLRB 808.

[6] The hearing was originally scheduled for January 30, 1989. The judge granted two postponement requests by the Respondent as it had been unable to locate Musa. The judge denied the Respondent's request for a third postponement.

[7] Unless otherwise noted, all dates between July and December are in 1987 and all dates between January and June are in 1988.

ther. Nor have I given a sworn statement to anybody which says what that document says.''

Although the judge expressed the view that the Respondent's efforts to locate Musa were not sufficient to bring the December 15 statement under Rule 804,[9] he admitted Rico's testimony regarding the two conversations, the December 15 document, and the March 5 affidavit into evidence.[10] He rejected the December 15 statement as probative ''for lack of authenticity and credibility'' in view of Ortiz-Murias' failure to verify the signer's identity, as required by Puerto Rican law. Finally, as noted above, the judge concluded that the Respondent had failed to establish that Musa recanted her testimony.[11]

At the outset, we find it unnecessary to pass on the sufficiency of the Respondent's efforts to locate and serve Musa.[12] After careful consideration, we find that none of the evidence submitted by the Respondent, taken either individually or cumulatively, creates sufficient doubt of the judge's credibility determination as to Musa's testimony to require us to alter our holding in the underlying case, and we find no merit in the Respondent's arguments to the contrary.

As an initial matter, the Respondent attacks the judge's discrediting of Rico's testimony regarding his meetings with Musa. The Respondent argues that the judge erred in placing the disclosure that Musa had been in prison on April 3, 1989, rather than April 15, as the parties had stipulated, and that this error colored his interpretation of Rico's testimony and the Respondent's case. We agree that the judge erred concerning the date of the disclosure and that he erred further in relying on the April 3 date to find that the Respondent had been remiss in trying to locate Musa. We note, however, that the judge's discrediting of Rico's testimony was also based on Rico's demeanor and on other factors discussed by the judge. Therefore, as noted above, we see no reason to overturn that resolution.

Moreover, even if Rico's testimony regarding these meetings were credited, it does not provide convincing support for the averments in the December 15 document. With regard to the November meeting, Rico's complete testimony as to the alleged recanting follows:

> we spoke about the meeting I had with her at the Guaynabo Shopping Center [about which Musa had testified in the 1985 hearing] . . . . She made clear to me that I had not intimidated her or threatened her. . . . That she had had problems with Mrs. Marquez up to the point, and I quote, that she had had to be escorted to and from her home by the police. . . . [S]he wanted to make things clear and clarify things . . . things that she had been forced to do and say against her will, against myself [final ellipsis in original].

These statements are simply too vague to support a conclusion that Musa was prepared to swear that her testimony at the original hearing was false or given under duress. In fact, Rico's testimony actually undercuts the authenticity of the December 15 document. A comparison of Musa's purported statements at the November meeting to those in the December 15 document shows that that document does not reflect Musa's own words, but is closer to a summary denial of the points of her testimony cited in the Board decision.[13] Thus, Rico's testimony regarding the November meeting provides no basis whatever for inferring that the December 15 document is genuine.

Rico's testimony regarding the December 15 meeting is equally devoid of assurances. Assuming that the woman at the restaurant was Musa, as Rico testified, there is no evidence that she actually swore to the averments in the document or that she ever saw the document introduced by the Respondent in its final form. Her statement to Rico that ''I can live with that'' plainly does not suffice as a formal oath or as an indication of an intent to swear. Further, according to Ortiz-Murias' testimony, the notarial seal and language, which are the only indications on the document of the signer's oath, were added out of Musa's presence and after she signed the paper. Thus, Rico's testimony affords no basis for an inference that the December 15 document is a statement of Musa's and should be credited over her testimony.[14]

[8] Concerning the Respondent's efforts to produce Musa, the parties stipulated that Cruz, a process server, visited Musa's last known address and employer on January 26, visited the address of a man with whom Musa was reported to be living with on February 24, visited Musa's mother on February 25, and visited Musa'a address again on February 25 and 27. On April 15, Cruz again visited Musa's mother, who informed him that Musa might have been in a local women's prison. Cruz called the prison but received no answer. Rico testified that he called the prison on April 16 and was told that no one named Raisa Musa Quinones was incarcerated there.

[9] Fed.R.Evid. 804 reads in pertinent part:

> (a) Definition of Unavailability.—''Unavailability as a witness'' includes situations in which the declarant—
>
> . . . .
>
> (5) is absent from the hearing and the proponent of his statement has been unable to procure [his] attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), [his] attendance or testimony) by process or other reasonable means.

[10] Neither party has excepted to the judge's admission of Rico's testimony regarding his conversations with Musa, the December 15 document, or the March 5 document. Under Sec. 10(b) of the Act, the Board applies the rules of evidence applicable in the Federal courts ''so far as practicable.'' See also *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

[11] In adopting the judge's conclusions, we do not rely on his discussion of the Federal Rules of Evidence or the laws of the Commonwealth of Puerto Rico.

[12] We note that a showing that a witness is unavailable under Rule 804 is merely the first step toward the admission and crediting of out-of-court statements. Under Rule 804(b)(3), which the Respondent argues is applicable to the December 15 document, ''[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.'' Thus, even assuming that Musa is unavailable, we are obliged to scrutinize statements alleged to be hers—whether introduced by the Respondent or by the General Counsel—with great care.

[13] See 286 NLRB at 427.

[14] Of course, it is also troubling that, apart from Rico's identification, the record contains no competent evidence that the woman who signed the paper actually was Musa. Ortiz-Murias, by his own admission, relied only on Rico's word that the woman was Musa; Rico's out-of-court identification of Musa to Ortiz-Murias carries no indicia of reliability. Moreover, the Respondent made no effort at the hearing to render Ortiz-Murias' testimony more competent or probative by, for example, asking him to describe the woman he met or to identify a picture of Musa.

Finally, the existence of the March 5 affidavit also undercuts the trustworthiness of the December 15 document. The later document's indicia of reliability are, at first blush, more convincing than those of the earlier one. Specifically, the record contains no testimony undermining its facial appearance of reliability, as it does with regard to the December 15 document. However, we must approach the contents of the March 5 document with the same caution accorded the Respondent's submissions. The March 5 document is also an out-of-court declaration concerning which no cross-examination has occurred, and an affidavit given to the General Counsel by an absent witness is subject to careful scrutiny. *United Sanitation Services*, 262 NLRB 1369, 1374 (1982); *National Family Opinion*, 246 NLRB 521, 524 fn. 1 (1979). Apart from the veracity of the declarations in the March 5 statement, however, the existence of a sworn statement totally disavowing the authenticity of the December 15 document and executed less than 90 days later further obviates reliance on the December 15 document as an authentic, truthful statement by Musa that should be credited over her record testimony in the underlying case. Thus, we agree with the judge that the Respondent has introduced no credible, probative evidence to warrant disturbing the credibility resolution or the holding in the underlying case.[15]

ORDER

The National Labor Relations Board affirms the September 30, 1987 Decision, Order, and Certification of Representative and orders that the Respondent, Omnix International Corporation, d/b/a Waterbed World, Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth therein.

[15] The Respondent argues alternatively that Musa's statement is admissible under Fed.R.Evid. 805(b)(5). We find no merit in this argument as it may pertain to the crediting of evidence once it has been admitted. For the reasons set forth above, we note that the December 15 document lacks substantial guarantees of trustworthiness as required by that rule.

In light of our findings here, we find it unnecessary to submit the record in this case to the Department of Justice for its consideration. See 289 NLRB 808, supra.

Antonio F. Santos, Esq., for the General Counsel.
James McCorkle, Esq. and *John Alberty, Esq.*, of Columbus, Ohio, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A hearing in the above captioned case was held before me on December 16, 17, and 18, 1985. I issued the decision in this matter on June 23, 1986. On September 30, 1987, the Board issued its Decision, Order, and Certification of Representative, finding that Respondent violated Section 8(a)(1) and (3) of the Act.

On January 22, 1988, Respondent filed a motion with the Board for a protective order to reopen the record because one of its former employees, Raisa Musa Quinones, had recently recanted her previous testimony in a sworn affidavit on December 15, 1987.

On July 13, 1988, the Board issued an Order denying Respondent's motion for a protective order, but granting its motion to reopen the record. The Board therefore remanded the proceeding to the administrative law judge to reopen the record, to take additional testimony and resolve the credibility questions raised by Musa's affidavit, and to issue his findings and conclusions of law in a supplemental decision consistent with his resolution of the issue. During a telephone conference with respective counsel for the parties about a date and convenient time to resume the proceeding, I issued an order on January 10, 1989, reopening the record in the above-captioned proceeding and scheduling a hearing for January 30, 1989.

During a telephone conference-discussion about issuing subpoenas with counsel for the respective parties on January 26, 1989, counsel for the Respondent moved to postpone the hearing because Respondent had been unable to locate Raisa Musa Quinones (Musa). After a consensus was reached on a hearing date, I rescheduled the hearing for March 15, 1989.

On March 4, 1989, counsel for Respondent filed a motion to postpone the rescheduled hearing because Respondent had not yet been able to locate Musa.

On March 9, 1989, I granted Respondent's motion for postponement and rescheduled the hearing for April 17.

The remand hearing in the instant case was held on April 17, 1989. Counsel for Respondent immediately announced that Respondent had been unable to locate Musa.

The parties stipulated that Respondent made the efforts stated in the below sworn statement by Ramon Cruz to contact Musa, but not to the truth of statement about her use of drugs; and that Musa is not present at the hearing today.

Ramon Cruz, a private investigator retained by Respondent to serve a subpoena on Musa, was called to testify.

Ramon L. Cruz, of legal age, married, resident of Bayamon, Puerto Rico, being duly sworn states the following:

1. That his name and personal circumstances are those described above.

2. That he is recognized in Puerto Rico as a process server. As an independent contractor, he is contracted by lawyers in Puerto Rico to serve complaints, summons, subpoenas, and other court documents for Federal and state proceedings.

3. That on January 25, 1989, he was contracted by Omnix International as a process server, to serve a subpoena to an individual by the name of Raisa Musa Quinones. The subpoena issued by the National Labor Relations Board No. D-85005 and signed by Mary Cracraft. Together with the subpoena I was given a check (money order) for the amount of $37 payable to Raisa Musa Quinones to cover fees and mileage. (The aforementioned subpoena is attached hereto as Exh. I.)

4. That on January 26, 1989, he went to the address listed on the subpoena but was not able to locate Musa. The current occupant of that apartment advised him that she had purchased the apartment from a Perez, who appeared to be Musa's landlord.

5. That on this same date, he appeared at the Environmental Quality Board located in Santurce to notify Musa of the subpoena. He had been previously advised that she was employed by that agency. That at the agency he met with Elias Doitteau Morales, personnel director of that agency. That Doitteau advised him that Musa had been dismissed from her job at the agency together with Alfredo Rodriguez Rivera who lived with Musa and a child of 7 or 8 months. That this person also advised him that various persons were also looking for her including agents of the Criminal Investigations Bureau of Bayamon and that he did not know her whereabouts. Doitteau also advised him that Musa's mother, whose name is Carmen Perez, had a business at the Rio Hondo Shopping Center.

6. The following efforts were also made by Cruz on this same date:

> a. I visited the mother who advised me that she no longer maintained any communications with her daughter;
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> 1. her daughter had drug related problems;
>
> 2. that her daughter lived with a man named Alfredo Rodriguez and had a child with the latter.
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> b. After receiving the second subpoena for Musa for the hearing scheduled for March 15, 1989 (Copy of which is attached hereto as Exhibit II) I visited Mr. Rodriguez's parents home at Calle 1 No. 346, Hills Brothers Ward in Rio Piedras, Puerto Rico on February 24, 1989.
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> 1. I was advised by Mr. Rodriguez's mother, Lydia Rivera that she did not know the whereabouts of Ms. Musa nor her son and volunteered that she knew that Musa was having drug problems and that her son had fathered her child.
>
> 2. Ms. Rivera also told me that Musa was being sought by Commonwealth detectives from Bayamon and Carolina.
>
> c. On February 25, 1989 I again visited Ms. Musa's mother who advised me she had nothing new to tell me regarding her daughter's whereabouts.
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> d. On this same date I went to the address listed on the subpoena and was advised by a security guard that there was no one home and I left my telephone number so that he could call me if he had any information as to Ms. Musa's whereabouts.
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> e. On February 27, 1989 I visited the apartment listed on the subpoena again because the security guard called me. On this occasion the security guard told me to talk to Ms. Musa's neighbor. I spoke to the aforementioned neighbor, Sara Rodriguez who advised me that Ms. Musa had moved but that she had no address to give me.

7. Cruz had made innumerable efforts to serve the aforementioned subpoenas upon Musa to no avail.

Investigator Cruz testified that in addition to efforts outlined in his affidavit of March 2, 1989, to serve Musa with a subpoena, he visited Carmen Perez, mother of Musa, about 1 or 2 p.m. on Saturday, April 3, 1989. Although Perez had told him on previous occasions that she did not know the whereabouts of Musa, she told him on this occasion that Musa had telephoned and informed her that she was detained at the Vega Alta Baja Women's Prison. She said she had told Musa she knew what was going to happen to her and she did not want to have anything to do with her. In any event, Perez said she has not since heard from Musa and did not know whether she was still at the prison. Cruz said he called Respondent's vice president, Rico, on the same day and informed him what Perez had told him.

On cross-examination, investigator Cruz further testified that after March 2, 1989, he made no further effort to contact Musa until Saturday, April 15, 1989, 2 days before the hearing in the instant matter. At that time, he said he called the prison but since it was the weekend, he did not receive an answer.

The Testimony of Supervisor Rico

Jaime A. Rico has been employed by Respondent since it was established 8 or 9 years ago. He is also vice president and secretary of the Company.

Rico testified that when he returned from Spain on November 19, 1987, he received the Board's decision and read Musa's testimony in the transcript of the proceeding, with which testimony he did not agree. He said he could not recall—remember—whether he discussed the Board's decision or Musa's testimony with Respondent's president, Alan Bennet. When counsel for the Acting General Counsel tried to elicit when did Rico first read the Board's decision issued by the judge in this case, he testified as follows:

> Q. Did you read the decision that the Judge issued in this proceeding back in 1986 when it arrived in Waterbed?
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> A. What I remember is about the transcription, about the other things I don't remember.
>
> Q. So all you remember is that you read the transcriptions of this proceeding sometime in November of '87, is that correct? . . .
>
> A. Yes, I remember reading the transcriptions because that's what made me take action to clarify that. Because I was not here nor was I witness as to what was said because I was not at the hearing.

Although Rico testified he could not recall—could not remember—whether he discussed the Board's decision in this case or the testimony of Musa with Respondent's president, Alan Bennet, he said he went to Musa's job at the Environmental Quality Board, and made a date with her to meet her at La Ponderosa Restaurant after Thanksgiving.

When Rico attempted to testify about a conversation he said he held with Musa, counsel for Acting General Counsel objected on the grounds that Respondent has not established that the witness is unavailable and that such conversation would be hearsay and is inadmissible. Counsel for Respondent argued that the purported conversation and an affidavit given by Musa are admissible under Sections 804(b)(3) and (5) and 804(a) of the Federal Rules of Evidence.

Counsel for the Acting General Counsel correctly further argues that the Board has held that affidavits are not admissible in lieu of testimony unless the witness is either deceased or so seriously ill that accepting the oral testimony poses a threat to the health of the witness. The rationale for the rule being, to admit the affidavit under other circumstances would deny the opposition an opportunity to cross-examine the affiant and deprive the administrative law judge of an oppor-

tunity to observe the demeanor and evaluate the testimony of the witness. *Limpco Mfg.*, 225 NLRB 987 (1976); *Sure Tan, Inc.*, 234 NLRB 1187 (1978); and *West Texas Utilities Co.*, 94 NLRB 1638 (1951).

An examination of Section 804(b)(3) and (5) of the Federal Rules of Evidence shows that the party offering the hearsay evidence must show:

> (1) that it has made sufficient and substantial efforts to locate the witness.
> (2) that the statement has substantial guarantees of trustworthiness, and
> (3) that the statement is against interest.

Moreover, under Rule 804(b)(5), the party offering the hearsay statement must further show:

> (1) the unavailability of the declarant as defined in Rule 804(a) and as in 804(b)(5);
> (2) that the statement has substantial guarantees of trustworthiness;
> (3) the statement is offered as evidence of a material fact;
> (4) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;
> (5) the general purposes of these rules and interests of justice will best be served by admission of the statement into evidence.

Under Rule 804(a)(5), unavailability must be demonstrated by showing:

> (1) the witness is exempt by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) the witness persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the Court to do so;
> (3) the witness testifies to a lack of memory of the subject matter of the declarant's statement;
> (4) the witness is unable to be present to testify at the hearing because of death or other existing physical or mental illness or infirmity;
> (5) the witness is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3) or (4), the declarant's attendance or testimony) by process or other reasonable means.

Evidence

In view of the above-cited Rules of Evidence, the only evidence presented by Respondent with respect to the unavailability of Raisa Musa Quinones to appear and testify, is as follows:

On January 25, 1989, Respondent retained the services of a professional process server (Ramon L. Cruz) in Puerto Rico to serve subpoenas on Raisa Musa Quinones; and that during the remainder of January, February, and until March 2, 1989, Cruz, following several leads on the whereabouts of Musa, made several unsuccessful efforts to locate and serve her. However, when Cruz went to the home of Musa's mother (Perez) on April 3, 1989, she told him Musa had telephoned and informed her that she (Musa) was being detained at the Vega Alta Baja Women's Prison. Cruz said he called Respondent's vice president, Jaime Rico, that same day and informed him of what Perez had told him.

Cruz admitted that after March 2, 1989, he made no effort to contact Musa until Saturday, April 15, 1989, 2 days before this hearing on April 17, 1989. At that time, he said he telephoned the prison several times on Saturday, April 15, and Sunday, April 16, 1989, but no one answered, presumably because it was a weekend. At no time between April 3 and April 15, after he learned that Musa was last reported to be at the prison, did Cruz ever go to the prison to verify whether or not she was there and attempt to serve her.

Conclusion

Based on the foregoing credited evidence, I conclude and find that between January 25, 1989, and March 2, 1989, Respondent (Cruz) made some efforts to locate Musa. However, in determining whether the efforts of Respondent to procure the attendance of Musa at this hearing were reasonable, attention is immediately drawn to Respondent's failure to pursue with dispatch its latest lead on the whereabouts of Musa. This lead, obtained from Musa's mother (Perez) April 3, 1989, that Musa was detained at the prison, was perhaps the hottest and most reliable lead Cruz had thus far obtained.

Notwithstanding, this lead, of all leads, was not diligently pursued by Cruz nor Rico (whom Cruz had informed about the lead April 3), by contacting or going to the prison immediately and talking to appropriate prison officials. Instead, no further effort was made by Cruz or any other representative of Respondent, to verify whether Musa was at the prison and attempt to serve her, until nearly 12 days later, April 15 and 16, 1989, a day or two before the instant hearing. Even at that time, Cruz only telephoned the prison and when he did not receive an answer, he did not go to the prison to make an inquiry.

Vice President Rico further testified that he made an effort to contact Musa on Sunday, April 16, 1989, the day before the hearing, when he went to the Vega Alta Baja Prison, in following up the lead information given to him by Cruz. He said he asked a person whose name he did not know, was someone imprisoned there named Raisa Musa Quinones. The person who searched visitors told him there was no one there by the name of Raisa Musa Quinones. Rico said he did not ask any further questions, and he left the prison.

Credibility

An analysis of Supervisor Jaime Rico's hearsay and nonhearsay testimony reveals that it is sketchy, sometimes unresponsive to important questions where language (English-Spanish) was not a problem, inconsistent with documentary evidence of record, infra, illogical under the circumstances, self-serving, and profoundly nonpersuasive.

More specifically, Rico testified that when he returned from Spain in November 1987, he read the transcription of Musa's testimony. He said he could not remember reading the decision in this case nor whether he discussed the decision or Musa's testimony with Respondent's president, Alan Bennet.

However, I find it inconceivable he would not have discussed or would not have remembered whether he discussed the decision and Musa's testimony in the instant case with President Bennet, when Rico was so disturbed by both (decision and Musa's testimony) that the company had the record in this proceeding reopened to correct his concerns.

Although Rico testified he was not at the hearing and was not a witness to what was said, I am persuaded he meant he was not in the hearing room when Musa testified, because the witnesses were sequestered. However, he did appear and testify in the hearing in December 1985. In any event his hearsay testimony in the reopened April 17, 1989 hearing about a conversation Rico said he had with Musa in May 1 and 3, 1985, is denied by Musa in her March 5, 1988 affidavit given to the Board, infra. In fact, in the latter affidavit, Musa stated that she did not change her testimony which she said was truthful. She explained that her response to Rico's question about a death threat by Marilu or Gloria was related to personal (domestic) matters, and not to the Union or National Labor Relations Board.

It is noted that Musa's March 5, 1988 affidavit does not appear to have been improperly executed as the evidence, infra, shows Respondent's Exhibit 8 was so executed. But even if it were, it at least establishes that Musa's statements in each document are contradictory to her statements in the other.

For the foregoing reasons, I do not credit Rico's inadmissible or his admissible self-serving hearsay testimony. Moreover, as I observed the demeanor of Rico and the evasive, nonresponsive, and equivocal manner in which he testified, I was persuaded he was not testifying truthfully about what he said Musa told him regarding the Union. The credited documentary evidence, infra, supports my conclusions.

Since Cruz was retained by Respondent (Rico), whom Cruz had informed about the lead, I find it difficult to conceive Respondent (Rico) not having directed Cruz to go to the prison on that day (April 3) or the following day (April 4). After all, if Musa was in fact at the prison, that was the surest way to locate and serve her, since her locomotion would have been restricted at the prison. Since Respondent failed to contact the prison for 12 days, 2 days before the instant hearing, I have misgivings that Respondent made reasonable efforts to procure Musa's attendance at the hearing.

This conclusion is further supported by the hearsay and self-serving testimony of Rico, as well as the circumstances surrounding Rico's procuring a signed statement from Musa, the admissibility of which are the subject of an evidentiary dispute.

Therefore, I am not persuaded that Respondent's efforts to locate Musa were necessarily reasonable and sufficient to satisfy the definition of unavailability under the rules of evidence. Notwithstanding, for purposes of affording Respondent every opportunity to pursue the legal theory of its case, the hearsay conversation Rico said he had with Musa at La Ponderosa after Thanksgiving in 1987 is admitted over the objections of counsel for the Acting General Counsel. This improperly admitted conversation is admitted because its admission may better serve continuity of the events and justice than its exclusion.

In that asserted conversation, Rico testified:

> Musa told him that when she worked for the Respondent in 1985, *she had many problems with Marilu Marquez and that she left with Gloria Garcia's husband*. Thereafter, they [Rico and Musa] talked about a conversation they had at the Guaynabo Shopping Center. He [Rico] said he took notes on the conversation with Musa which he later typed. He said she told him she had problems with Mrs. Marilu Marquez to the extent that she had to be escorted to and from her home by police; that she wanted to clarify things that she was forced to do and say against her will—against him [Rico]. When asked on cross-examination whether Musa had any alcoholic beverages that evening, Rico said he could not remember, but he did not think so.

As their luncheon ended, Rico said he arranged to call Musa at her job to agree on a date when they could meet again. Thereafter, he called Musa on two or three occasions trying to agree on a time convenient for both of them. Finally, they agreed to meet at the Pizza Hut in Hato Rey on the evening of December 15, 1987. (End of hearsay conversation.)

Preparation and Signing of Alleged Affidavit

Rico continued to testify that when he went to the Pizza Hut on December 15, 1987, he had the statement Musa gave him in November, which he typed (R. Exh. 8). He said Musa and the person she had previously identified as her husband were at the Pizza Hut when he, accompanied by his attorney, Jorge Ortiz-Murias, arrived. Musa did not know Attorney Ortiz-Murias and he (Rico) introduced Attorney Ortiz-Murias to Musa, and she extended her hand to him and identified herself as Raisa Musa Quinones. When asked did Musa show any identification to Attorney Ortiz-Murias, Rico said he did not know.

Nevertheless, Rico said they sat down and, before ordering food, he took out the statement Raisa had previously given him, which he had typed subsequently (R. Exh. 8). Musa stated those were her statements and she could live with them. He said she thereupon signed the statement in the presence of himself and Attorney Ortiz-Murias, who kept the statement.

Testimony of Attorney Jorge Ortiz-Murias

Jorge Ortiz-Murias was called by the Respondent and testified that he has been an attorney licensed to practice law in Puerto Rico for about 9 years. He said about 3 years ago he was retained by Rico to represent him in the administration of the estate of Rico's mother. Thereafter, he said they became and has since then remained friends.

When asked on cross-examination what, if any, type of work did he do for Rico in mid-December 1987, Ortiz-Murias testified that at the request of Rico, he accompanied Rico to the Pizza Hut next to his office on December 15, 1987, before Raisa Musa Quinones and her husband arrived. While they were awaiting the arrival of Musa, Rico told him Respondent had had a problem with a case in court and the young lady he wanted him to meet was a principal witness in the case, who had lied in the trial and wanted to change her testimony. Rico said he wanted to preserve her statement under oath in an affidavit. When Musa arrived, she told him she was Raisa Musa Quinones and that she had worked for

Waterbed World with him, which she described as a pleasant experience. She introduced a gentleman with her as her husband. Attorney Ortiz-Murias acknowledged he did not know Musa or her husband prior to them meeting that evening.

Attorney Ortiz-Murias said Musa told him she had previously dictated the typewritten statements in the document held by Rico (R. Exh. 8); that she made the statements freely and of her own will; and that she had not been forced to make the statements in that document. Musa then read the document (R. Exh. 8) and appeared satisfied with its contents, and she signed it. Counsel said he told her he wanted to notarize it and he took the document (R. Exh. 8) to his office and typed the declaration on it.

On cross-examination, Attorney Ortiz-Murias was asked if he asked Musa for any identification. He said, ''no.''

When asked was he aware that under the laws of Puerto Rico, a notary should request at least two persons to identify an affiant, he said ''no, you need a witness in case it's a public instrument, like a deed of sale, but not an affidavit.'' He said he was satisfied as a notary with Rico's identification and that the affiant was an employee of Rico. On further interrogation, Attorney Ortiz-Murias said he was not sure if two witnesses were required by the law.

Attorney Ortiz-Murias was asked whether an attorney who does not know the affiant is required under law to request an identification of the affiant. He responded that such an affiant can be identified by producing a photograph on a driver's license, or by a third party who knows the declarant.

The parties stipulated to the authenticity (not contents) of the certification and translation of Respondent's Exhibits 9a and b, respectively.

Admissibility of Musa's Sworn Statement

Since Raisa Musa Quinones was not present at the hearing, counsel for Respondent moved for the admission of Respondent's Exhibits 8 (Musa's affidavit), 9a (the translation of that affidavit), and 9b (the certification) pursuant to Rules 804(b)(3) and (5) of the Federal Rules of Evidence. Counsel for Acting General Counsel objected to the admission on the grounds that the affidavit is inadmissible hearsay. He argued that the document (R. Exh. 8) is also inadmissible because Respondent has failed to establish that Musa ever recanted her testimony or signed the December 15, 1987 affidavit, because Respondent did not establish that the person who signed the affidavit was in fact Raisa Musa Quinones. In support of his position, he argued that not only has Respondent failed to establish that the person represented to Attorney Ortiz-Murias was in fact Musa, but that the statements in her December 15, 1987 affidavit (R. Exh. 8) are contradictory to statements in Musa's subsequent affidavit (G.C. Exhs. 13a and b) given to counsel for the Acting General Counsel March 5, 1988. In the latter affidavit, counsel contends that Musa reiterated that her testimony in December 1987 was the truth, and she denies, among other things, that she recanted her December 1985 testimony or signed the December 15, 1987 affidavit (R. Exh. 8).

The bench deferred ruling on the admissibility of Respondent's Exhibit 8 until his receipt of the briefs from respective counsel with respect to admissibility under the Rules of Evidence.

Counsel for Acting General Counsel then conditionally moved for the admission of Musa's March 5, 1988 affidavit (G.C. Exhs. 13a and b), if Musa's December 15, 1987 affidavit will be admitted in evidence. Respondent did not respond to the latter conditional motion by counsel for Acting General Counsel. Apparently, Respondent did not know counsel for Acting General Counsel had an affidavit taken from Musa subsequent to her December 1987 statement which Rico said she gave to him.

An examination of Rule 804(b)(3) of the Rules of Evidence shows that Respondent's Exhibit 8 (Musa's December 15, 1987 affidavit) is not admissible because, as previously found above, Respondent has not creditably established that Musa is unavailable to testify. That is, Respondent has not exhausted sufficient, reasonable, and substantial efforts to locate and obtain Musa's presence as a witness in this proceeding.

To the contrary, the foregoing credited evidence shows that between January 10 and April 17, 1989, the extent of Respondent's efforts to locate Musa was to retain private investigator Cruz to search for and serve Musa with subpoena to appear. However, the evidence shows that Cruz made an effort to locate Musa only between January 10 and March 2, 1989, and on April 15 and 16, 1989. No effort was made by him to locate Musa between March 2 and April 14, 1989, even though his hottest unpursued lead reported Musa was in the Vega Alta Baja prison. Cruz reported the latter information to Respondent's supervisor Jaime Rico. Cruz did not contact the prison until April 15 and 16, 1989, and even then, he only telephoned the prison a few times and did not receive an answer.

The only other effort assertedly made by Respondent to locate Musa, according to the testimony of Supervisor Rico, was his visit to the prison on Sunday, April 16, 1989, the day before the hearing, and inquired of an unidentified person who searched visitors whether a person named Raisa Musa Quinones was there. When the person responded there was no one there by that name, Rico left the prison and that was the extent of his questionable and feeble effort to verify whether or not Musa was there.

The record does not show that Respondent ever inquired about police records, although it had reports that police were looking for Musa relating to her involvement with drugs. Under these circumstances, I am not persuaded that Respondent exhausted reasonable and substantial efforts to locate and serve Musa to appear at the hearing which Respondent requested and knew was scheduled for April 17, 1989. *Town & Country Nursing Home*, 291 NLRB 76 fn. 7 (1988).

Nor does the credited evidence of record show that Respondent has satisfied the criteria of Rule 804(b)(5) *Other Exceptions*, of the rules for the admissibility of the statement (R. Exh. 8).

It is noted that Rule 804(b)(5) and its parts (A), (B), and (C) are, by the language of this section, conjunctive. That is, in addition to establishing that the statement has equivalent circumstantial guarantees of trustworthiness, the court must also determine that (A) the statement is offered as evidence of a material fact; (B) that the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

An examination of the affidavits (R. Exh. 8 and G.C. Exh. 13) are as follows:

Respondent's Exhibit 8

> I, Raisa Musa Quinones reside at Lago Mar Condominium, Apartment 6D in Isla Verde, Puerto Rico and wish to inform the National Labor Relations Board of the following:
>
> I testified in the administrative case #24–CA–5160 held on December 16, 17 and 18, 1985 because my personal well-being and security were threatened by Marilu Marquez and Gloria Garcia and I now wish to correct my testimony declaring the following:
>
> On May 1, 3, 1985 nor at any other time, did Jaime Rico threaten me with retaliation or with rewards in relation to my employment or union activities.
>
> Jaime Rico did not tell me that it was not for my benefit to participate in union activities.
>
> Jaime Rico did not tell me that Gloria Garcia or Marilu Marquez were involved with the union.
>
> Jaime Rico nor any officer of Waterbed World has pressured me nor has promised me anything of value so that I would now make these declarations nor have I been offered employment.
>
> Jaime Rico did not tell me not to get involved with the union.
>
> AFFIDAVIT NUMBER; 1.343
> SWORN AND SIGNED BEFORE ME BY: Raisa Musa Quinones, who is of age, married, employed at the Plannification Board and resident of Carolina, Puerto Rico, of whom I give witness of personally knowing in this City of San Juan, Puerto Rico, today December 15, 1987.
>
> JORGE ORTIZ MURIAS
> Notary Public

General Counsel's Exhibit 13

An examination of General Counsel's Exhibit 13 reveals, as counsel for the Acting General Counsel contends, that in pertinent part, Musa stated in an affidavit given to General Counsel March 5, 1988, as follows:

> That I never signed a sworn statement or any other kind of document in which I have changed my testimony at the hearing. That to the contrary, that Jaime Rico had been calling me on several occasions in order to talk to me, something which I did not want to do, but that I told Rico that what I had testified at the hearing and in the sworn statement which I previously gave to the National Labor Relations Board was the truth.

In the same affidavit, Musa further stated that around November-December 1987, after Rico continued to insist that she talk with him, that he invited her to have dinner with him and she refused. Later she accepted his invitation and, accompanied by her husband, did go to the showroom of the Respondent. There, she sat on a bed while Rico, standing, asked her if Marilu Marquez or Gloria Garcia had made a death threat. She replied, ''yes, that on one occasion Marilu had made me a death threat, but that it was on account of some personal problems between her and me which had nothing to do with the Union. The personal problems between Marilu and myself were that I had married Marilu's father, husband of Gloria Garcia [Marilu's mother]. Rico asked me if Marilu had threatened me on account of the Union. I told him Marilu had not threatened me, that she had spoken to me about the Union and that I was involuntarily. During the conversation Rico did not ask me anything about what I testified during the unfair labor practice hearing, nor did he ask me anything about the conversations I had with him on May 1 and May 3, 1985.''

Conclusion

Considering both of the above affidavits (R. Exh. 8 and G.C. Exh. 13) pursuant to Rule 804(b)(5)(A), (B), and (C) of the Federal Rules of Evidence, I find that Respondent's Exhibit 8 does not have equivalent circumstantial guarantees of trustworthiness because of Rico's discredited testimony and Musa's subsequent (3/5/88) affidavit given to the Board which contradicts the December 15, 1987 statement (R. Exh. 8); (A) that Respondent does offer Musa's December 15, 1987 statement as a material fact; (B) that because Rico's testimony is not herein credited, and Musa's alleged statement in Respondent's Exhibit 8 is not only excludable self-serving hearsay, but also contradictory to her subsequent sworn statement of March 5, 1988, and her original testimony; and (C) that since Respondent's evidence does not satisfy Rule 804(b)(5)(B), the Court cannot apply (5)(C) of the Rules, and admit Musa's December 15, 1987 statement on the basis that the general purposes of these rules and the interest of justice will best be served by their admission. That statement cannot be admitted because Rule 804(b)(5)(A), (B), and (C) by language in this section, is not alternative but conjunctive in character. Respondent having failed to satisfy (5)(B), it cannot avail itself of Rule 804(b)(5) of the rules. Consequently Respondent's Exhibit 8 is not admissible under Rule 804(b)(5) of these rules.

However, because of the extensive and probably expensive efforts made by Respondent to establish that Musa's testimony was untruthful, I, in the exercise of my administrative discretion, am of the opinion that the purposes of justice in this case will be best served by admitting both Respondent's Exhibit 8 and counsel for Acting General Counsel's Exhibit 13 in evidence, so that they will be a part of the record, and any reviewing tribunal to observe and determine whether the two statements are in fact contradictory.

Accordingly, Respondent's Exhibit 8 and counsel for Acting General Counsel's Exhibit 13 are admitted in evidence.

The Validity or Authenticity of the December 1987 Statement

Counsel for the Acting General Counsel also argues that Respondent's purported December 1987 affidavit of Raisa Musa Quinones should be rejected because it was not executed in compliance with Puerto Rico's notarial law. In support of his position, he cites the law and argues as follows:

> Section 887. Registry of affidavits or declarations of authenticity–Definition
>
> By affidavit or declaration of authenticity is meant the act and the document by means of which a notary or any other of the officers designated by sections 887–

> 895 of this title certifies to, or witnesses the truth or recognition of a signature, an oath, or any other fact or contract affecting real or personal property not made in a public instrument. Mar. 12, 1908, p. 39, Section 1, eff. May 1, 1908.
>
> Section 889. Form of affidavit or declaration; numbering
>
> The affidavit or declaration of authenticity shall be drawn in the following form. In the case of the recognition of a signature under oath:
>
> Sworn to and subscribed before me, by _____ (name, age, trade or occupation and residence) personally known to me (or who has *been identified to my satisfaction by the two witnesses*, known to me, whose statement to that effect is also *signed by them*), this, the _____ day of _____ 19_____.
>
> In the case of the recognition of a signature not made under oath, the same form shall be used, except that the words ''sworn to'' shall be stricken out.
>
> A concise and simple form shall be used for all other cases and which shall include the authenticity of the act, but in all cases the *officer authorizing same shall set forth that he knows personally the interested party; or knows the witnesses identifying such party*. Affidavits or declarations of authenticity shall be numbered in successive and continuous numbers and each declaration shall contain at its head the number corresponding to it and which shall be correlative with that of the entry in the Registry, referred to hereinafter. Mar. 12, 1908, p. 39, Section 3, eff. May 1, 1908.

According to Professor Pedro Malaret Vega in its article ''Notas sobre el Derecho Notarial Puertorriqueno:'' published in the Catholic University Law Review at page 243:

> The word *affidavit* is a latin expression, and more properly *affidavit*, that derives from *affida*, which means *I give faith*. . . . An affidavit is a formal statement of *authenticity*. It should be distinguished from a sworn statement, because not all affidavits have sworn statements, nor does all sworn statements appear in the form of affidavits. However, an affidavit can include a sworn statement; but there can be a statement of authenticity of signatures without necessarily having a swearing in . . . .

Thus, it is clear that the December 15, 1987 affidavit is not an affidavit but rather is, at best, a statement of authenticity.

Thereafter counsel for Acting General Counsel further argued that since Attorney Ortiz-Murias testified he did not take an oath from Musa, the December 15, 1987 document is, at best, simply a ''statement of authenticity,'' and that it should be noted that in the December 1987 document, Attorney Ortiz-Murias certified that he *personally knows* Musa. Nonetheless, Attorney Ortiz-Murias testified under oath at the hearing that he *did not personally know* Musa; and that according to *In Re Pedro Perez Rodriquez, Esq*., 115 DPR 547 (1984), in which a notary had failed to use the proper and reliable methods of identifying unknown persons, without expressing that his attestation was based on attesting witnesses, and untruthfully asserted that he knew the executing party, the notary had failed to comply with the statutory requirements.

Also, in *In Re Raul Olmo Olmo*, 113 DPR 441 (in the English report at p. 568 Appendix C herein, pp. 590–591), the Supreme Court stated:

> Now then, if the notary lacks said information (personal knowledge of the affiant) he can resort to such supplementary methods as the identifying witnesses, if they, as the legal text states, are ''persons well-known to the notary.'' What meaning does this repute have? In discussing the problem, most commentators are inclined to sustain that a *simple* knowledge is not enough, that a notary must adequately and satisfactorily know the moral solvency of the witnesses since, what guarantee can the notarial authentication have if the notary does not see as honest the witnesses who will supplement his lack of knowledge?

Applying the above-cited legal authority to the facts in the instant case, counsel for the Acting General Counsel maintains, and correctly so, that under the circumstances here, Attorney Ortiz-Murias apparently did not exercise the kind of cautious judgment that should have been exercised by a notary. Here, it was Rico, Respondent's chief witness, who was trying to overturn testimony against himself because he wanted to perpetuate the statement of authenticity; that it was Rico who prepared the statement hopefully to exonerate himself from violation of law; and that it was Rico, who was the only witness, that represented a young lady to Attorney Ortiz-Murias as being Raisa Musa Quinones. Consequently, it was Rico's representation upon which Attorney Ortiz-Murias was relying for an accurate and truthful identification of the affiant of the statement, and more importantly, if the statement was in fact signed by Musa, she would have been committing perjury.

It is therefore clear that under the questionable circumstances of authenticating Respondent's document (R. Exh. 8), it was incumbent upon Attorney Ortiz-Murias, under Puerto Rico's law as a notary, to resort to supplementary methods to identify the signatory of the statement (R. Exh. 8). Unfortunately, Attorney Ortiz-Murias admitted that he did not attempt to obtain supplementary evidence to verify the identity of the person represented by Rico to be Musa. Rico, his friend, was the only witness to identify the affiant.

In this regard, counsel for Acting General Counsel also supplies and refers to Puerto Rico's Statement of Motives of the Notary:

> In this role, the Puerto Rico Notary is not a lawyer for any one of the grantors, nor does he represent any client whatsoever, he represents public faith, he represents the law to all parties. The main quality that distinguishes him from lawyers is his impartiality. Under such conditions he must act at a level above that of the parties involved.

Counsel for the Acting General Counsel also supplied and cited the case of *In Re Atty. Ormar Cancio Sifre*, 106 DPR 386 (in English report at p. 452 Appendix D, where the Supreme of Puerto Rico held at p. 456):

> Now then, if the notary lacks said information (personal knowledge of the affiant) he can resort to such supplementary methods as the identifying *witnesses, if they*, as the legal text states, are ''persons well-known to the notary.'' What meaning does this repute have? In discussing the problem, most commentators are inclined to sustain that a *simple* knowledge is not enough, that a notary must adequately and satisfactorily know the moral solvency of the *witnesses* since, what guarantee can the notarial authentication have if the notary does not see as honest the witnesses who will supplement his lack of knowledge?

Conclusion

It is clear from the above law that Attorney Ortiz-Murias was obligated thereunder to certify that he knows the signatory of Respondent's Exhibit 8; or that two witnesses attested that they knew and they identified the signatory; or that he obtained supplementary evidence of the identity of the person represented to be Musa, who signed the December 15, 1987 statement. This is especially so since he (Ortiz) was a friend of the only witness and the procurer (Rico) of the statement and did not personally know the identity of the signatory. Additionally, since Attorney Ortiz-Murias did not assure himself of the identity of the signatory of the statement (R. Exh. 8) by more than one witness (only his involved friend Rico), counsel did not comply with the above-cited article 16 of the notarial law. Consequently, Respondent's December 15, 1987 statement is null and void and is rejected for lack of authenticity and credibility.

I therefore conclude and find on all the credited evidence of record that Respondent has failed to establish, by credited, authentic, and probative evidence that witness Raisa Musa Quinones recanted her testimony previously given and stated that she lied about statements she attributed to Jaime Rico about the union activity. In fact the record is replete with credited evidence that Musa did not recant her December 1985 testimony in a December 15, 1987 statement given to Supervisor Rico. Respondent has failed in its effort because it has failed to produce witness Musa, and it has failed: (1) to establish that witness Musa was unavailable to appear and testify in this proceeding on April 17, 1989; (2) that Respondent was unable to establish that Musa changed her testimony in a subsequent validly executed affidavit or statement of authenticity which is properly admissible in evidence under the Federal Rules of Evidence; and (3) that Musa's statements in her affidavit given to the Board on July 17, 1985, are consistent with her testimony of December 1985 and her statements in her affidavit of March 5, 1988; and (4) that Musa's statements in an apparently valid affidavit subsequently executed on March 5, 1988, clearly contradicts the statements in Respondent's invalidly executed, inadmissible and self-serving hearsay statement of December 15, 1987 (R. Exh. 8).

Consequently, I find that Quinones' December 1985 testimony remains credited as previously found by the undersigned because Respondent has failed to produce the witness (Raisa Musa Quinones), it has failed to establish that she is unavailable, and it has not offered a justifiably admissible affidavit or other credited evidence to support its assertion that she lied in testifying, and has since recanted her testimony.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

Accordingly, Respondent has failed to present any credible evidence which warrants a change in the findings or the issued decision, based on the testimony of Raisa Musa Quinones.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.